Supreme Court, U.S.
FILED

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

AZTEC GENERAL AGENCY,
Appellant
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
In Its Corporate Capacity,
Respondent

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

Stephen R. Goetzmann
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Ste. 330
Dallas, Texas 75201
214-871-2565

23pp

The question presented for review

Were the commercial letters of credit issued to Aztec General Agency insured deposits under 12 U.S.C. § 1813(*l*)(1)?

A list of all parties

John Henry Pelt d/b/a Aztec General Agency, Petitioner/Appellant in this Court;

Ann S. DuRoss, Robert D. McGillicuddy, and Jeannette E. Roach, 550 17th Street, N.W. Room H-3071, Washington, D.C. 20429, Counsel of Record for Respondent/Appellee Federal Deposit Insurance Corporation.

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Opinion Below

The opinion of the Court of appeals for the United States Fifth Circuit Court of Appeals (1.) is an unpublished opinion. This opinion was a review of the Federal Deposit Insurance Corporation, In Its Corporate Capacity, hereinafter referred to as FDIC, decision denying appellant's claims.

Jurisdiction

The opinion of the United States Fifth Circuit Court of Appeals in this matter was rendered September 4, 1998. (See Appendix 1) Thereafter, Petitioner's motion for rehearing was overruled November 18, 1998.(See Appendix 2) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Applicable Statute

The Federal Deposit Insurance Corporation is burdened with paying for insured deposits under the following definition:

> "(1) the unpaid balance of money or its equivalent received or held by a bank or a savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking saving, time or thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the band or savings association or a letter of credit or a traveler's check on which the bank is primarily

liable: Provided, That, without limiting the generality of the term 'money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or instrument is primarily or secondarily liable, or for a charge against a deposit account, or in settlement of checks, drafts or other instruments forwarded to such bank or saving associations for collection."12 U.S.C. § 1813(*l*)(l)

Jurisdiction of the Court Below

Jurisdiction of the United States Fifth Court of Appeals was proper under 12 U.S.C.S. §1821 (f)(4) as a review of the Federal Deposit Insurance Corporation's determination in accordance with Chapter 7 of Title V of the United States Code, 5 U.S.C. §701 et.seq. On January 31,1996, the FDIC notified Petitioner of disallowance of his claim presented therein. Pursuant to 12 U.S.C. §1821 (f)(4), (5) the Petitioner for review was filed with the United States Court of Appeals, 5th Circuit, on March 29, 1996, within the sixty-day statute of limitations required for such determination.

Statement of the Case

Aztec General Agency provided public work performance and construction bonds to construction companies to build state, county and municipal buildings in

the State of Texas[1]. The construction companies paid Aztec General Agency for its services, in part, with the letters of credit. The FDIC concluded that Aztec's letters of credit were not an insured deposit.(See Appendix, 3)

Reasons of Allowing this Writ

United States court of appeals for the Fifth Circuit did not command the FDIC to follow this Court unmistakable analysis in Philadelphia Gear to first determine whether a letter of credit is a commercial or clean letters of credit. Federal Deposit Ins. Corp., v. Philadelphia Gear Corp., 476 U.S. 426 (1986). Letters of credit are the method of payment many merchants in many different types of transactions. Congress recognized their importance by specifically including them in the definition of an insured deposit. Although, this Court specifically differentiated clean or commercial letters of credit from standby letters of credit no federal appellate court has published an opinion directing the FDIC to pay claims on commercial letters of credit. Without direction from this court the FDIC will continue applying the Philadelphia Gear hard assets test, to all letters of credit. In doing so the FDIC jeopardizes stability and strength of our nation's banking system.

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[1]Vern. Tex. St. Annot. Texas Gov't Code Chapter 2353.023.

The Federal Deposit Insurance Act defines an insured deposit as:

> "(1) the unpaid balance of money or its equivalent received or held by a bank or a savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking saving, time or thrift certificate...or **a letter of credit** or a traveler's check on which the bank is primarily liable: Provided, That, without limiting the generality of the term money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or instrument is primarily or secondarily liable...."

12 U.S.C. § 1813(l)(1)(Emphasis added). This Court previously applied this particular portion of the above statute in Federal Deposit Ins. Corp., v. Philadelphia Gear Corp., 476 U.S. 426 (1986). Justice O'Connor, writing for the majority, concluded "a letter of credit" means commercial and standby letters of credit. Philadelphia Gear, 476 U.S. at 428 (1986). The particular letter of credit in Philadelphia Gear, a standby letter of credit conditioned payment upon the default of the account party. Id. In accord with that letter a draft drawn upon the letter of credit would be honored by the bank only if accompanied by Philadelphia Gear's " 'signed statement the [it had] invoiced Orion Manufacturing Corporation and that said invoices have remained unpaid for at least 15 days.' " Id. This Court determined the letter to be a standby in looking only to the content of the letter itself in accord with well established rules of contractual interpretation. Auto Servico

San Ignocia, SRL v. Compania Anonima Venezolano De Navegacion, 765 F.2d 1306, 1310 (5th Cir. 1985). This Court established that only standby letters of credit must be backed by hard assets to become insured deposits.

Apparently, the FDIC did not read Aztec's letters in conjunction with Justice O'Connor's opinion in Philadelphia Gear, wherein, this Court first determined, solely from the content of the letter, that the Philadelphia Gear letter that it was a standby letter of credit and made the following rule:

> "Because the letter or credit was intended to provide payment to the seller only if the buyer of the letter invoiced goods failed to make payment, the letter of credit was what is commonly referred to as a 'standby' or 'guaranty' letter of credit. See, *e.g.*, 12 C.F.R. § 337.2(a), and n.1(1985)(defining standby letters of credit and mentioning that they may " ' guaranty' payment of a money obligation"). A conventional 'commercial' letter of credit, in contrast, is one in which the seller obtains payment from the issuing bank without looking to the buyer for payment even in the first instance. See ibid...."

Philadelphia Gear, 476 U.S. at 427 (1986). Nothing in Aztec's letters prevented Aztec General Agency drawing on the letters of credit except presentation of the letter to the financial institution. (See Appendix 4). The FDIC disallowed Aztec's claim because it considered the letters standby letters. (See Appendix, 3). The FDIC maintained its position even though the United States District Court of Texas for the Northern District, Judge Solis, found the above quoted letter of credit a clean letter of credit as an insured deposit. (See

Appendix, 5 for unpublished opinion)[2].

The Aztec letters of credit are the other side of the coin from the Philadelphia Gear letter. Most of the letters, each addressed to Aztec General Agency and signed by the bank officer, read as follows:

> "By order of our client, J & D Construction Company, we hereby establish this Irrevocable Letter of Credit No. 03-07-1989 in your favor for an amount up to but no exceeding the aggregate sum of seventy thousand and no/100 Dollars ($70,000.00), effective immediately, and expiring at the offices of the bank on March 7, 1990, unless renewed has hereinafter provided.
>
> Funds under this Letter of Credit are available to you against your Sight Draft, signed by your authorized corporate officer, drawn on us bearing the clause 'Drawn Under Letter of Credit No. 034-07-1989.'
>
> This Letter of Credit will be automatically renewed for a one-year period upon the expiration date set forth above and upon each anniversary of such date, unless at least sixty (60) days prior to such expiration date, or prior to any anniversary of such date, we notify both you and your client in writing by certified mail that we elect not to so renew this Letter of Credit.

---

[2] Aztec General Agency filed suit in Cause No. #:91-CV-2361-P asking for a review of the FDIC denial of a letter of credit. The District Court granted Aztec's Motion for summary judgment, in part, and found the letter in question to be "...true, clean letter of credit" and therefore an insured deposit.

> Upon receipt by you of our notice of election not to renew this Letter of Credit, you may draw hereunder by your Sight Draft drawn on use and bearing the clause 'Drawn Under Letter of Credit No. 03-07-1989.'
>
> This Letter of Credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended or amplified by reference to any documents or instrument referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates and any such reference shall not be deemed to incorporate herein by reference any document or instrument.
>
> All bank charges and commissions incurred in this transaction are for the applicant's account.
>
> We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that such drafts will be duly honored by presentation to the drawee.
>
> Except as otherwise expressly stated herein, this credit is subject to the Uniform Custom and Practice for Commercial Documentary Credits (1974 Revision)."

(See Appendix, 3). These letters do not make payment conditioned upon a default of the account party as in Philadelphia Gear. Id. In fact, the letter contemplates this letter being sold to a bona fide holder or a holder in due course. (See Appendix 4)

Evidently the FDIC did not consider the content of the letters of credit themselves. In fact, the FDIC argued, to the

Fifth Circuit Court, two basic points. First, since they could not find records of accounts for the account party the letters of credit were not payable. Second that "Aztec is Barred From Obtaining Deposit Insurance on Standby or Disaffirmed LOCs...." Both of these approaches assume that Aztec's letter are standby. Why else would the FDIC have to look to the failed bank's records when they had a genuine bank record in the letters of credit themselves? The letters of credit are written by the banks and signed by the bank's officers. (See Appendix, 4). The FDIC looked to additional banking records because it assumed the letters to standby letters with were payable only if hard assets were present. At the administrative level the FDIC disallowed Aztec's claims, in part, because:

> "...The letters of Credit comprising your claim were secured by contingent promissory notes, and no money or its equivalent had been give for consideration. Therefore, the Letters of Credit do not constitute insured deposits as defined in 12 U.S.C. § 1813(1). ..."

(See Appendix 3). At no point did the FDIC point to any of the language of Aztec's letters of credit in determining them to be standby letters, instead they simply assumed them to be standby.

The Fifth Circuit failed to recognize that the FDIC's acted arbitrarily and capriciously, in denying Aztec's claims. York Bank & Trust Co. v. Federal Sav. & Loan Ins. Corp., 851 F.2d 637, 639-41(3rd Cir. 1988) cert. denied, 488 U.S. 1005 (1989). Nothing could be more arbitrary then to apply the Philadelphia Gear standby letter test without considering the content of the letters.

Conclusion

Letters of credit of the type used by Aztec are vital to our economy. Mr. Verkuil in his 1973 article, on letters or credit cited in Philadelphia Gear, explained that data showed that the bulk of approximately $40 billion in international trade relied upon letters of credit. See Verkuil, Bank Solvency and Guaranty Letters of Cred, 25 Stan. L. Rev. 716, 716(1973) It not hard to imagine that a means of shifting the risk of non-payment from the seller of goods or deliverer of services to a bank providing the confidence to send the sellers goods or provide services because the money's already in the bank. The purpose of the FDIC creation was to make sure our country could count on its banking system after its failure during the great depression. In fact, the system was intended to allow "that every citizen may place the fruits of their toil and know that a deposit slip in return for their hard earnings will be as safe as a Government bond." See Federal Deposit Ins. Corp., v. Philadelphia Gear Corp., 476 U.S. 426 (1986) quoting 77 Cong.[***1936] Rec. 3837, 3838, 3840(1933)(remarks of Rep Stegall). Aztec presented bank records to verify its deposit as defined by the statute. It would be cruelly ironic that Aztec's toil in guaranteeing completion of state, county and municipal building, which it presumed to be paid was money in the bank, evaporated because of failure of the very government entity meant to protect its citizens. The FDIC's actions in this matter were without regard to this Court's clear direction.

Respectfully Submitted,

Stephen R. Goetzmann
2651 N. Harwood, Ste. 330
Dallas, Texas 75201

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 97-60630

AZTEC GENERAL AGENCY,

Petitioner,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, In Its, Corporate Capacity

Respondent,

Petition for Review: Federal Deposit Insurance Corporation
(12 USC 1821 (f) (4)

Before POLITZ, Chief Judge, EMILO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:[1]

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under limited circumstances set forth in

ENFORCED. See 5th Cir. R. 47.6.

5th Cir. R. 47.5.4

FDIC
Federal Deposit Insurance Corporation
5080 Spectrum Drive, Suite 1000E, Dallas, Texas 75248
(800) 759-9314 · (214)991-0039
Southwest Service Center Division of Depositor & Asset Services

January 31, 1996

Aztec General Agency
Attn: John Pelt
508 N. Cedar Ridge
Duncanville, DC 75116

Re: **Notice of Disallowance of Claim**

Dear Mr. Pelt:

Please reference your letter dated November 20E 1995, asserting a claim for $6,432,434 on the basis of numerous Letters of Credit issued for the benefit of Aztec General Agency asserting that these should be treated as insured deposits. The letters of Credit were issued by a variety of banks, some of which were eventually placed in receivership and some of which remain open. Obviously, there can be no claim for deposit insurance in regard to banks which are still open, and Aztec must pursue any claims it might have with those individual institutions.

Your claim has been reviewed by the Receiver for those institutions which were closed and placed into receivership. The Receiver has determined to disallow

your claim for the following reasons:

> The Letters of Credit comprising your claim were secured by contingent promissory notes, and no money or its equivalent had been given for consideration. Therefore, the Letters of Credit do not constitute insured deposits as defined in 12 U.S.C. §1813(1). Additionally, Aztec cannot file under the claims procedures in regards to these Letters of Credit, as the time frame for filing has expired for all of the receiverships.

You have the right to seek judicial determination of the disallowance of your claim. To obtain such review, you must file a lawsuit (or continue a prior pending action) on your claim in the district or territorial court of the United States for the district within which the banks' principal places of business were located or the United States District Court for the District of Columbia1 within SIXTY (60) days of the date or postmark, whichever is later, of this letter. Your failure to file suit (or move the court to continue a prior pending action) bn. or before the 60 days from the later of the date of or postmark of this letter, will result in your claim being forever barred and you will have no further rights or remedies with respect to your claim.

Your only means of review of the disallowance of your claim is to file a lawsuit as set forth above.

The statutory provisions governing this claims process are found in section 1821(d)(3)-(13) of Title 12 of the United States Code; You may wish to obtain advice from an attorney concerning these claims process. The

FDIC cannot provide legal advice.

If you have any questions, please contact the undersigned at (214)385-6235.

Sincerely,

Gary Makovec
Claims Specialist

Chireno State Bank
P.O. Drawer 84
Chireno, Texas 75937
409/362-2336
409/275-2336

March 7, 1989

Aztec General Agency and/or
Great Plains Insurance Co., Inc.
5787 South Hampton Road, Suite 300
Dallas Texas 75232

RE: IRREVOCABLE LETTER OF CREDIT NO. 03-07-1989

Beneficiaries:

By order of our client, J & D Construction Company, we hereby establish this Irrevocable Letter of Credit No. 03-07-1989 in your favor for an amount up to but not exceeding the aggregate sum of seventy thousand & 00/100($70,000) dollars, effective immediately, and expiring at the offices of the bank on March 7, 1990, unless renewed as hereinafter provided.

Funds under this Letter of Credit are available to you against your Sight Draft, signed by your authorized corporate officer, drawn on us bearing the clause "Drawn Under Letter of Credit No. 03-07-1989"

This Letter of Credit will be automatically renewed for a one-year period upon the expiration date set forth above and upon each anniversary of such date, unless at least sixty (60) days prior to such expiration date or

prior to any anniversary of such date, we notify both you and your client in writing by certified mail that we elect not to so renew this Letter of Credit.

Upon receipt by you of our notice of election not ot renew this Letter of Credit, you may draw hereunder by your Sight Draft drawn on us and bearing the clause "Drawn Under Letter of Credit No. 03-07-1989.

This Letter of Credit sets forth in full the terms of our understanding and such undertaking shall not in any way be modified, amended or applied by reference to any documents or instrument referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates and any such reference shall not be deemed to incorporate herein by reference any document or instrument.

All bank charges and commissions incurred in this transaction are for the applicant's account.
We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that such drafts will be duly honored upon

presentation to the drawee.

Except as otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practice for Commercial Documentary Credits.

Very truly yours,

William H. McMillion
President

WHM/ec

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AZTEC GENERAL AGENCY	§
Plaintiff,	§
	§
NO. 3:91-CV-2361-P	
vs,	§
	§
FEDERAL DEPOSIT INSURANCE	§
CORPORATION, AS RECEIVER OF	§
CHIRENO STATE BANK, AND IN ITS	§
CORPORATE CAPACITY,	§
Defendants	§

MEMORANDUM OPINION AND ORDER

The Memorandum Opinion and Order in the above-styled and numbered cause signed and entered on February 5, 1992 is vacated. This Memorandum Opinion and Order is substituted therefor.

Now before the Court are the following dispositive motions:

1) Plaintiff's Motion For Summary Judgment, filed on November 15, 1992.

2) Defendants' Response To Plaintiff's Motion For Summary Judgment, filed on December 31, 1992;

3) Plaintiff's Brief in Response To Defendants' Response to Plaintiff's Motion For Summary Judgment, filed on January 19, 1993;

4) Plaintiff's Notice of Non-suit of FDIC-Receiver, filed on January 4, 1993;

5) Defendant FDIC-Receiver's Response to Notice of Non-suit, filed on January 20, 1993;

6) Motion To Dismiss For Lack of Subject Matter Jurisdiction and Brief in support Thereof, filed on February 24, 1993;

7) Brief in Support of Motion To Non-suit FDIC As Receiver For Chireno Bank Without Prejudice, filed on February 24, 1983; and

8) Brief in Support of Defendants' Position Regarding Awarding of Interest and Attorneys' Fees, filed on February 24, 1993.

FACTS

The dispute between the parties involves a Letter of Credit ("LOC"), No. 03-07-1989, issued by Chireno State Bank, Chireno, Texas, ("Chireno") on March 7, 1989. The LOC, in the amount of $70,000.00, was established for the benefit of Aztec General Agency ("Aztec") by J&D Construction Company ("J&D"). J&D executed a promissory note ("Note"), in the amount of $70,000.00, payable to Chireno in the event that the LOC was to be paid. The Note was secured by certain J&D equipment.

A fee equal to one percent (1%) of the LOC was

charged by Chireno upon its issuance. After the fee was paid, the LOC was valid for one (1) year, expiring on March 7, 1990. The LOC provided for automatic annual renewal of the LOC upon payment of the one percent (1%) fee.

The LOC was renewed by J&D in 1990, and again in 1991.

On May 9, 1991, Chireno was declared insolvent, and the FDIC was appointed Receiver.

On May 10. 1991, FDIC-Receiver notified J&D and Aztec that Chireno's records indicated that they were respectively the account party and beneficiary of the LOC. The LOC was characterized by the FDIC-Receiver as "a -stand-by letter of credit."

On May 21, 1991, Aztec requested payment on the LOC.

No written disaffirmation of the LOC by FDIC-Receiver was received by Aztec; but, on October 25, 1991, FDIC-Receiver did terminate all liens that it held on J&D's equipment which secured the $70,000.00 promissory note.

On September 27, 1991, Aztec filed suit in the 14th Judicial District Court of Dallas County, Texas against Chireno and FDIC-Corporate. Aztec sought to recover the $70,00.00 on the LOC, and alleged other causes of action, including claims of breach of contract and violation of the Texas Deceptive Trade Practices Act.

On October 25. 1991, FDIC-Receiver filed its Plea of Intervention and Motion to Substitute as a Defendant party in place of Chireno. On that same day, both FDIC-Corporate and FDIC-Receiver filed their Original Answers in the State Court action.

On October 31, 1991, FDIC-Corporate and FDIC-Receiver filed their petition for removal to federal

court.

On March 1, 1992, the Court entered an Order Approving Joint Stipulation of Dismissal at DTPA claims.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter or law. See Fed. R. Civ. P. 56. As the Fifth Circuit stated in Christophersen v. Allied-signal Corp., 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party rnust demonstrate that it is Entit1ed to judgrnent as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case."

If the moving party bears the burden of proof on a claim or defense upon which it is moving for sununary judgment, it must come forward with evidence that establishes "beyond peradventure all of the essential elements of the claim or defense." Fontenot V Upjohn Company, 780 F.2d 1190, 1194 (5th Cir. 1986).

II. ARGUMENTS REGARDING LETTER OF CREDIT

The gist of Plaintiff's Motion For Summary Judgment is that the LOC is an insured deposit that FDIC-Corporate is legally obligated to pay, just like any other insured deposit, when an insured bank fails, citing 12 U.S.C.§ 1813 (1) Cl) 1989:

"The term 'deposit' means --

(1) the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit [emphasis added] or a traveler's check on which the bank or savings association is primarily liable,,,," Id.

Plaintiff characterizes the LOC as a "true letter of credit" and a "clean letter of credit" that is payable upon presentation or sight, citing U.C.C. § 5-103 (a) (l} and Ensco Enviromental Services, Inc. v. United States, 650 F. Supp. 583 (W.D. Mo. 1986). As a beneficiary of a true, clean letter of credit, Aztec contends that it is not required to present any documentation, or wait for any contingency or default of any party to occur, in order to collect payment on the LOC. On the other hand, the gist of Defendants' opposition to Plaintiff's Motion For Summary Judgment is that the LOC is a "standby letter of credit" that the United States Supreme Court has construed as not being a deposit protected and insured under the Federal Deposit Insurance Act, citing FDIC v. Philadelphia Gear Corporation, 476 U.S. 426, 106 S.Ct. 1931, 90 L-Ed.2d 428 (1986). Consequently, from the Defendants' perspective, the FDIC-Receiver was within its authority to disaffirm the LOC.

In response, Plaintiff argues that even if the Court were to rule that the LOC is in fact a standby

letter of credit, the FDIC- Receiver ouqht not have disaffirmed the LOC. Relying primarily on First Empire Bank-New York v. FDIC, 572 F. 2d 1361 (9th Cir. 1978), cert. denied, 439 U.S. 919, 99 S.Ct. 293 (1979), Plaintiff asserts that the LOC, as a standby letter of credit, is a provable claim. The three prong test enunciated in First Empire to determine provability of a standby letter of credit claim was adopted by the Fifth Circuit. See Interfirst Bank-Abilene, 777 F.2d. 1092, 1094 (5th cir. 1985) , and Citizens State Bank Lometa v. F.D.I.C., 946 F.2d 408 (5th Cir. 1991). In order to establish a standby letter of credit claim under the First Empire three prong test, as adapted by the Fifth Circuit, the beneficiary is required to show: "1) it existed before the issuing bank's insolvency and did not depend on any new contractual obligation arising later; 2) liability on the claim was absolute and certain in amount when suit was filed against the receiver; and 3) the claim was made in a timely manner." Citizens State Bank of Lometa, at 412.

While Plaintiff maintains that the LOC is a true, clean letter of credit, and should be paid as an insured deposit by FDIC- Corporate, he asserts that if the Court were to construe the LOC as a standby letter of credit, the LOC passes the First Empire test.

Defendants argue that pursuant to 12 U.S.C. § l821(e), as amended by the Financial Institutions Recovery, Reform & Enforcement Act of 1989 ("FIRREA"), the FDIC-Receiver was authorized to disaffirm or repudiate the LOC as a burdensome contract. Therefore, Plaintiff ts not entitled to payment of the LOC as a standby letter of credit under First Empire. The Defendants also contend that First Empire is a pre-FIRREA case, and is no lonqer viable law.

II(A). ANALYSIS AND RULING

Courts have generally def ined standby letters of credit in terms of contingency. Some default or other triggering event must occur before a standby letter of credit will be paid. First Empire, at 1366-1367; Citizens State Bank of Lometa, at 414.

Construing the LOC in light of these definitions, the Court finds that the LOC is a true, lean letter of credit. There is nothing in the language of the LOC that can be construed as prescribing a particular default, contingency or event that must occur to payment.

In, Philadelphia Gear, payment the letter of credit was contingent on the beneficiary providing documentary proof that the buyer of equipment had not paid. In Citizens state Bank of Lometa, payment of the letter of credit was contingent on the beneficiary providing documentary proof that the maker of a loan had defaulted. There is no similar contingency in the LOC at issue in this case The only contingencies in the LOC pertain to the expiration and renewal of the LOC. If these contingencies had occurred, the LOC simply would have expired and ceased to exist. They were not conditions precedent which would trigger payment of the LOC. In fact, the LOC in this case provides that upon notice by Chireno of its intent not to renew the LOC, which had to be provided at least 60 days before the expiration date of the LOC, Aztec could present the LOC fpr payment. At the time Aztec presented the LOC to Chireno for payment, J& D had paid the annual LOC fee, and that fee had been accepted by Chireno. consequently, the LOC was in full force and effect, and Aztec was not obligated to prove the occurrence of some contingency to collect. All that was necessary for collection was presentment, and Aztec has done that.

Since the Court finds that the Loc is a true, clean letter of credit, the Court GRANTS Plaintiff's Motion For Summary Judgment insofar as it rules that the FDIC is obligated to pay the LOC as an insured deposit.

III. ARGUMENTS REGARDING PRE-JUDGMENT AND POST-JUDGMENT INTEREST

Plaintiff contends that he is entitled to pre-judgment interest, citing for support the UCC, Texas case law, Republic National Bank of Dallas v. Northwest National Bank of Fort Worth, 578 S.W. 2d 109 (Tex 1978) and New Braunfels National Bank v. Odiorne, 780 S.W. 2d 313 (Tex. App. -Austin, 1989), a Federal District Court decision, Agri Export Cooperative and Bankers Trust Company v. Universal Savings Association, 767 F. Supp. 824 (S.D. Texas, 1991), and a Federal Appellate Court decision, First Empire.

In opposition, Defendants cite Philadelphia Gear Corporation v. FDIC, 751 F. 2d 1131 (10th Cir. 1984), in which the Tenth Circuit Court of Appeals held that absent an express waiver the doctrine of sovereign immunity bars claims for pre-judgment interest. Id. at 1138-1139. The Tenth Circuit specifically determined that congress did not waive sovereign immunity with respect to pre-judgment interest on insurance proceeds claims:

"...Congress expressly recognized that delays would occur in paying some insurance claims, yet it did not expressly waive its immunity to prejudgment interest. Under those circumstances we must hold that prejudgment interest should not have been awarded on the claims for insurance proceeds." Id. at 1139.

III(A). ANALYSIS AND RULING

The Court considers Philadelphia Gear dispositive of the issue of pre-judgment interest. Consequently, the Court DENIES Plaintiff's Motion for pre-judgment interest.

IV. ARGUMENTS REGARDING POST-JUDGMENT INTEREST

Plaintiff cites 28 U.S.C. § 1961 in support of his contention that he ought to be awarded post-judgment interest. In opposition, Defendants make the same sovereign immunity argument that it makes in support of its position against the award of pre-judgrnent interest.

IV(A). ANALYSIS AND RULING

The Court relies on the reasoning explicated in the Fifth Circuit decision of A.L.T. v. Small Business Admin., 823 F.2d 126 (5th Cir. 1987), to determine whether post-judgment interest is appropriate in this case. Quoting from LIbrary of Congress v. Shaw 478 U.S. 310, 106 S.Ct. 2957, 2961, 92 L.Ed.2d 250 (1986), the Fifth Circuit acknowledged in A.L.T. that generally "the United States is immune from awards of interest absent an 'express congressional consent to the award of interest separate from a general waiver of immunity to suit.' A.L.T. at 127. An exception to that rule regarding sovereign immunity from awards of post-judgment interest is applicable when the Governmental entity assumes the status of a commercial enterprise. Id.

In A.L.T. the Fifth Circuit stated that determining whether a governmental agency assumes the status of a private enterprise "Turns on whether the government agency's activities are primarily commercial and whether those activities aspire to profitarility." Id. at 128. Applying that test to the instance case, the Court

rules that the FDIC is a governmental agency that has assumed the status of a private enterprise. Unlike the Small Business Administration, the governmental agency in A.L.T., the FDIC is financially self-sufficient and is not dependant on Congressional funding and "was established to provide services that, while commercial in nature, would not be supplied by the private market" Id. at 128.

Consequently, the Court GRANTS Plaintiff's Motion for post -judgment interest at the rate of 3.21%, a rate equal to the coupon-issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of this judgment

V. ARGUMENTS REGARDING ATTORNEYS' FEES

Plaintiff cites 28 U.S.C. E 2412(b) in support of his argument that he be awarded attorneys' fees.

Defendants cite a different section of the same statute, 28 U.S.C. S 2412(d) (i) (A), to argue that denial of attorneys' fees is appropriate because the position of the FDIC is substantially justified, and/or there are special circumstances that make the award of attorneys.

V(A). ANALYSIS AND RULING

Court finds that 28 U.S.C. 2412(b) is dispositive. Furthermore, the court finds that the FDIC's position in the lawsuit is not substantially justified, nor are there any special circumstances that make the award of attorneys' fees inappropriate.

Regarding the amount of attorneys' fees, the Court holds the FDIC to its stipulation, made at the conference held on the morning of the date of the trial

setting, Tuesday, February 16, 1993, that the amount at attorneys' fees for plaintiff will be $19,200.00, contingent on the court's determination of whether Plaintiff will be awarded attorneys' fees. The Court rules that Plaintiff is Entit1ed to attorneys' fees. Consequently, the Court GRANTS Plaintiff's Motion for attorneys' Fees, in the amount of $15,200.00, as previously stipulated to by the parties.

SO ORDERED
March 9, 1993

JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 3 1999
OFFICE OF THE CLERK

No. 98-1933

In the Supreme Court of the United States

AZTEC GENERAL AGENCY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the FDIC correctly denied petitioner's claim for deposit insurance on 24 letters of credit (LOCs) because the books and records of the failed issuing institutions revealed that the LOCs were not backed by "hard" or "tangible" assets on deposit.

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) enforcing the determination of the Federal Deposit Insurance Corporation (FDIC) is unreported. The FDIC's denial of petitioner's claim for deposit insurance appears at Tab 7 to the Administrative Record (A.R. Tab 7).

JURISDICTION

The petition for review was denied on November 18, 1998. Pet. App. 2. The petition for a writ of certiorari was filed on February 16, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, the Federal Deposit Insurance Corporation (FDIC) insures bank and savings association deposits in prescribed circumstances. The issue in this case is whether the FDIC properly rejected petitioner's claim that letters of credit, not backed by any hard or tangible assets, were "insured deposits" under the Act. An "insured deposit" is "the net amount due to any depositor for deposits in an insured depository institution" after deducting offsets, less any part thereof which is in excess of $100,000. 12 U.S.C. 1813(m)(1).[1] When appropriate, the FDIC pays a depositor "as soon as possible * * * in an amount equal to the insured deposit of such depositor." 12 U.S.C. 1821(f)(1). The FDIC determines the amount

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[1] A "deposit" in turn, is defined in 12 U.S.C. 1813(*l*)(1), in pertinent part, as follows:

> the unpaid balance of money or its equivalent received or held by a bank or a savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit or a traveler's check on which the bank or savings association is primarily liable: *Provided*, That, without limiting the generality of the term "money or its equivalent," any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable.

of an insured deposit by examining the deposit insurance records of a failed federally insured institution. 12 C.F.R. 330.3(i). In making that determination, the FDIC may rely on the deposit account records of the failed institution. 12 C.F.R. 330.5(a)(1).[2]

Letters of credit (LOCs) are insurable as deposits only when they are issued in exchange for "tangible assets" or "hard earnings" and are reflected as a liability on the bank's books and records. *Philadelphia Gear Corp.* v. *FDIC*, 476 U.S. 426, 438-440 (1986). Without such hard assets, the FDIC treats the letter of credit for deposit insurance purposes as though no

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[2] 12 C.F.R. 330.5(a)(1) provides, in pertinent part:

> [I]n determining the amount of insurance available to each depositor, the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution. If the FDIC, in its sole discretion, determines that the deposit account records of the insured depository institution are clear and unambiguous, those records shall be considered binding on the depositor, and the FDIC shall consider no other records on the manner in which the funds are owned.

Courts have held that those records provide conclusive support for the FDIC's determination. See, *e.g.*, *Nimon* v. *RTC*, 975 F.2d 240, 246 (5th Cir 1992) ("when the account records are clear and unambiguous, their statement of the capacity in which funds are owned is conclusive"); *Abdulla Fouad & Sons* v. *FDIC*, 898 F.2d 482, 484 (5th Cir. 1990) ("Congress has restricted the class of possible federal deposit insurance claimants by providing that FDIC may recognize ownership of deposit accounts only when held by persons whose name or interest is disclosed on the deposit account records."); *Philadelphia Gear Corp.* v. *FDIC*, 751 F.2d 1131, 1138 (10th Cir. 1984) ("The law provides that the records of the insolvent bank are conclusive as to a claimant's entitlement to deposit insurance."), rev'd on other grounds, 476 U.S. 426 (1986).

commitment had been made and therefore no insurable deposit had been lost. *Id.* at 440.

2. On November 20, 1995, petitioner filed a claim for deposit insurance with the FDIC for more than $6 million, plus $5 million in punitive damages, contending that 52 LOCs issued for its benefit by 47 separate depository institutions were insured deposits.[3] On January 30, 1996, the FDIC denied that claim, and petitioner sought review by the court of appeals. FDIC C.A. Br. 2. On March 28, 1997, the court of appeals vacated the FDIC's determination, stating that the agency's denial of petitioner's insurance claim "fails to provide a reasoned explanation under the appropriate standard of review." A.R. Tab 4, at 1. The court of appeals concluded that the FDIC's administrative record contained deficiencies and remanded the case to the agency. *Id.* at 5.

3. On remand, the FDIC conducted an exhaustive investigation of the deposit records of each issuing

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[3] In September 1991, petitioner had filed a state court action against the FDIC and Chireno State Bank (Chireno), seeking recovery on one LOC. That LOC, issued by Chireno at the request of J&D Construction, was backed by a contingent promissory note secured by equipment and was payable if petitioner drew upon it. A.R. Tab B-24, at 2-3. The FDIC, however, had been appointed Chireno's receiver in May 1991. It intervened, removed the case to federal court, and moved to dismiss on jurisdictional grounds. The district court instead granted summary judgment in petitioner's favor. Pet. App. 9. The court of appeals vacated that decision because petitioner had failed to file a claim with the FDIC for a final insurance determination. Such a determination is itself reviewable only by a court of appeals. FDIC C.A. Br. Add. A. The court of appeals remanded to the district court with instructions to dismiss. When petitioner filed its deposit insurance claim with the FDIC on November 20, 1995, however, the number of LOCs for which it claimed deposit insurance had increased to 52.

institution. It reviewed the books, records, and files of each institution for all 52 LOCs that formed petitioner's November 20, 1995, claim. As part of that investigation, the FDIC, through its claims agent in Dallas, also requested from petitioner any supplemental documentation, written evidence, or argument in support of its claim. A.R. Tab 5. Petitioner submitted no additional documentation or evidence, stating that the "LOCs need no additional documentation." A.R. Tab 6.

On June 19, 1997, the FDIC issued its deposit insurance determination on petitioner's claim. A.R. Tab 7. The FDIC first addressed 27 LOCs issued by 20 institutions that had not failed and which therefore were not eligible for payment of deposit insurance. A.R. Tab 7, Exhs. A-1 through A-20. The FDIC advised petitioner that any claims based upon theories of recovery on the 27 LOCs issued by open institutions "[are] properly addressed to those institutions." A.R. Tab 7, at 1.

The FDIC then turned to 25 LOCs issued by institutions that had failed and for which deposit insurance might be owing. A.R. Tab 7, Exhs. B-1 through B-25. The FDIC denied deposit insurance coverage as to all 25 LOCs. The FDIC set out a chart detailing the reasons for the denials, including: (1) LOCs that were not listed on the books and records of the issuing institution; (2) LOCs that had passed to a bank that had assumed the assets and liabilities of the failed bank; (3) LOCs that had expired; (4) LOCs that were the subject of an allowed receivership claim filed years before by petitioner; (5) an LOC claim that had been settled in earlier litigation; (6) LOCs that had been previously disaffirmed by the receiver as a standby letter of credit (including the Chireno LOC that was the subject of the vacated district court action); and (7) LOCs that had expired and were later disaffirmed by

the receiver. A.R. Tab 7, Exh. B.[4] In a number of instances, more than one of those defects applied. Petitioner was apprised of its right to request review by the court of appeals. Pet. C.A. Br. Add. A.

4. The court of appeals denied, without opinion, petitioner's petition for review. Pet. App. 1-2.

ARGUMENT

The court of appeals correctly enforced the FDIC's denial of deposit insurance on all 24 LOCs that petitioner included in its appeal.[5] The court's holding does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner contends (Pet. 3) that the court of appeals' decision conflicts with *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986), which involved an insurance claim on a standby letter of credit.[6] Petitioner asserts that *Philadelphia Gear* denied deposit insurance coverage for a standby letter of credit backed only by a contingent promissory note (not hard assets), and therefore all *commercial* letters of credit (which it claims the 24 LOCs to be) are insured whether backed

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[4] In addition, two of the LOCs were issued by credit unions. The FDIC lacks regulatory authority over credit unions and does not have a legal obligation to insure deposits in those institutions. A.R. Tab 7, at 1.

[5] In the court of appeals, petitioner dropped claims to several LOCs, limiting itself to 24 LOCs issued by failed institutions. Pet. C.A. Br. 4-5.

[6] A standby letter of credit typically obligates the issuer to make payment on an indebtedness of the account party, or to make payment on a default of the account party. See *Philadelphia Gear*, 476 U.S. at 428. A commercial letter of credit, by contrast, typically obligates the issuer without regard to a default of the account party. *Ibid.* See 12 C.F.R. 337.2(a).

by hard assets or not. Pet. 4-8. That argument is incorrect.

In *Philadelphia Gear*, this Court held that a standby letter of credit does not constitute an insured deposit if it was issued in exchange for a contingent note. 476 U.S. at 439-440. The beneficiary of a letter of credit is entitled to recover deposit insurance upon the issuing bank's failure only if the account party deposited "hard assets" or "tangible assets" in exchange for the letter. See 476 U.S. at 440. As the Court noted, that situation typically occurs with a standard commercial letter of credit. *Ibid.* Where hard assets back up a letter of credit, the rationale of deposit insurance—that "someone who put tangible assets into a bank could always get those assets back"—is demonstrably met. *Id.* at 435.

Petitioner errs in interpreting *Philadelphia Gear* to mean that "only standby letters of credit must be backed by hard assets to become insured deposits." Pet. 5. The absence of *hard assets* on deposit, and not the LOC's status as "standby," is what rendered the standby letter of credit uninsurable in *Philadelphia Gear*. Petitioner's erroneous understanding of *Philadelphia Gear* leads it to assert incorrectly (Pet. 5) that all *commercial* letters of credit must be fully insured. Although this Court in *Philadelphia Gear* noted that commercial letters of credit are "typically" backed by hard assets, it did not find that *every* commercial letter of credit is so backed and therefore is an insured deposit. See 476 U.S. at 440 ("With a standard 'commercial' letter of credit, Orion would typically have unconditionally entrusted Penn Square with funds before Penn Square would have written the letter of credit, and thus Orion would have lost something if Penn Square became unable to honor its obligations."). By

the same token, the Court did not rule that standby letters of credit can *never* be backed by hard assets and therefore can never qualify for federal insurance. A *standby* letter of credit may indeed qualify for deposit insurance when "hard assets" have been deposited in the bank to back it up. See *id.* at 438.[7]

In short, this Court's decision in *Philadelphia Gear* makes clear that an LOC is an insured deposit only when it is backed by hard assets. The court of appeals properly applied that test here. Petitioner offers no authority from any court of appeals to support its position.

2. The FDIC exhaustively examined the underlying documentation of the LOCs and properly found that none of the 24 LOCs at issue was backed by "hard assets." The FDIC claims agent located and examined in detail the books and account records of every issuing institution, and not one of the LOCs for which petitioner claims deposit insurance was listed as a liability on any of the books and records of those failed banks. A.R. Tab 7, Exhs. B-1 through B-25. The absence of appropriate documentation in those account records—which include all types of records that "relate to the insured depository institution's deposit taking function"

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[7] Petitioner also wrongly suggests that "commercial" letter of credit is synonymous with "clean" letter.of credit. Pet. 3. A letter of credit is "clean" when the beneficiary may draw upon it upon presentation of a sight draft; the issuing bank may not require other documents, such as proof of the account, party's performance, or default. See, *e.g.*, *Ensco Envtl. Serv., Inc.* v. *United States*, 650 F. Supp. 583, 589 (W.D. Mo. 1986). A standby letter of credit, however, may also be "clean." *Baker* v. *National Boulevard Bank*, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975). The FDIC's deposit insurance determination does not turn on whether a letter of credit is "clean."

(12 C.F.R 330.1(e))—is dispositive. The FDIC may rely exclusively on the account records of the failed institution in making deposit insurance determinations. See *In re Collins Sec. Corp.*, 998 F.2d 551, 554 (8th Cir. 1993) ("FDIC's longstanding practice of looking primarily at the failed bank's deposit account records in determining insurance claims is clearly a permissible interpretation of [its] statutory mandate[]").[8]

Accordingly, the court of appeals correctly held that petitioner has no entitlement to deposit insurance for any of its LOCs. Furthermore, any case-specific dispute over the adequacy of the FDIC's factual inquiry in this case would not warrant the Court's review.

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[8] In this case, the FDIC did not limit itself to the books and records of the failed institutions in determining that each of the LOCs upon which petitioner sued was not an insured deposit. The FDIC also exercised its discretion to inquire into whether petitioner had evidence to support its claim and invited petitioner to produce any such evidence. See 12 C.F.R. 330.5(a)(1); A.R. Tab 5. Petitioner's response—that the LOCs "need no further documentation as they are insured deposits" (A.R. Tab 6)—provides no contrary evidence that would call into question the FDIC's determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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